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Supreme Court of the United States

OCTOBER TERM, 1939.

No. 643.

BENTLEY W. WARREN and CHARLES W. MULCAHY, as the Trustees of the Property of BOSTON AND PROVIDENCE RAILROAD CORPORATION,

v.

HOWARD S. PALMER, ET AL., as the Trustees of the Property of THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY AND OLD COLONY RAILROAD COMPANY.

On Petition for a Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

MEMORANDUM FOR THE PETITIONERS.

ERWIN N. GRISWOLD,
JOHN NOBLE, JR.,
PAUL E. TROY,
Attorneys for the Petitioners.

February 29, 1940.

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MEMORANDUM FOR THE PETITIONERS.

The argument of the case of *Thompson* v. *Magnolia Petroleum Co.*, No. 481, October Term, 1939, on Wednesday, February 28, 1940, seems to have disclosed clearly the essential conflict between the decision below in that case on the question of jurisdiction, and the decision of the court below here. The decision of the Seventh Circuit

Court of Appeals was clearly a decision on *jurisdiction*, and as such cannot fairly be reconciled with the decision below in this case.

But in the *Magnolia Petroleum* case, the question of jurisdiction and the question on the merits happen to coincide. For that reason, counsel on neither side of that case was concerned with arguing the underlying question of jurisdiction. The case was presented for the petitioner on the assumption that it would do no good for this Court to reverse the decision on jurisdiction, if the decision below must necessarily go against the petitioner on the merits; while the respondent has no interest in the jurisdictional question as long as the deeds are held to grant only an easement. Neither party presented any argument on the question of the jurisdiction of the District Court, except in response to the questions of the Court. Moreover, such discussion as there was proceeded in terms of possession, while further argument and consideration might show that possession is not the test of jurisdiction under Section 77 of the Bankruptcy Act. See Assignment of Error No. 4 in the petition in this case.

For this reason, we submit that the present petitioners should not be foreclosed by any decision which might be directed towards the jurisdictional question in the *Magnolia Petroleum* case. The existing conflict should not be resolved without full consideration. The relevant arguments can be adequately presented to the Court only by granting the writ of certiorari in this case, with the resulting briefs of both parties and oral argument on the basic question of jurisdiction—a question which goes by default of both parties in the *Magnolia Petroleum* case.

This is especially true because of the added factors against jurisdiction in this case which are not present in the *Magnolia Petroleum* case, such as the fact that Congress has expressly granted to the Massachusetts court "exclusive jurisdiction" of the Boston and Providence and its property. The petitioners here should not be foreclosed

on such questions by a decision in the *Magnolia Petroleum* case where neither counsel was concerned with directing argument towards the jurisdictional question.

For these reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted so that the jurisdictional question may be adequately presented by both sides, and the conflict resolved after full consideration by the Court.

Respectfully submitted,

ERWIN N. GRISWOLD,
JOHN NOBLE, JR.,
PAUL E. TROY,
Attorneys for the Petitioners.

February 29, 1940.